No. 43852-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

NORTHWEST CASCADE, INC.

Appellant,

v.

UNIQUE CONSTRUCTION, INC.; TEMPORAL FUNDING, LLC; WILLIAM REHE; JANE DOE REHE; WILLIAM K AND MARION L LLLP; and SAHARA ENTERPRISES, LLC,

Respondents.

BRIEF OF RESPONDENTS

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March 4, 2013

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COMES NOW the Respondents/Cross-Appellants herein, and submit for the Court's consideration this Response and Cross Appeal brief:

I. INTRODUCTION

This was a case where a plat went bad at the beginning of real estate recession. The contract claims were tried to a jury which did find monies owing from Unique Construction, Inc. ("Unique") to Northwest Cascade Inc. ("NWC"). That portion of the case will not be appealed. However the main focus of the case was that NWC was in search of a solvent defendant. Despite never seeking any individual guarantees, any individual financial statements, no cross collateralization, no financials from Unique, and never running a credit check on anyone involved - NWC attempted to have the trial court use the extraordinary remedy of piercing the corporate veil to reach parties and assets it never contracted to have such a remedy against and, which, frankly, NWC never knew about until well into this litigation.

The trial court ruled against NWC on the corporate disregard claims and refused to allow NWC to reach various assets that the Rehes had in their own personal name. There was no evidence that the assets, primarily a stock account, were ever in Unique. The court did enter judgment based on the jury award of a fraudulent conveyance of a property that had been in Unique's name but had been transferred out to a Nevada limited liability company, Sahara Enterprises, LLC. Such property also was unknown to NWC at the time of contracting and as argued by the Rehes, simply provided NWC a fortuitous asset to recover

against. While the respondents respect the jury verdict and are not appealing it, the trial was hotly contested as the money to acquire the property and build the home (referred to as the "89th Street Property") came from the Rehes' personal funds and was either a capital contribution or a shareholder loan. The Rehes had actually moved into the house and transferred it out of Unique as it was really no longer a corporate assets, but one being used individually. Not content with having this fortuitous piece of property, NWC now ascribes error to the court in not considering another piece of property belonging to an unnamed party to this litigation as evidence supporting the doctrine of corporate disregard.[1]

Given that judgment was entered on the jury verdict, and the court entered its findings, conclusions and judgment on the remaining case regarding corporate disregard, the parties moved for attorney fees. NWC's fee claim was based on the jury verdict against Unique regarding the contract and UFTA. The Rehes made claim against NWC related to prevailing on the corporate disregard claims. As will be discussed herein, NWC, at the time of the request had $377,658.00 (CP 594) in attorney fees and costs, while all of the other defendants had $135,417.20 (CP 467).

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[1] The court should be aware that NWC has filed a second lawsuit in Pierce County under No. 12-2-13410-1 in an attempt to seek to reach the 38th Avenue Property that it did not seek to recover in this lawsuit and which it claims the trial court erred in not considering. However, the record is clear that the court heard and considered evidence related to such property known as the 38th Avenue Property. The court simply noted that the entity holding 38th Avenue was not before the court and no remedy had properly been requested vis-à-vis the 38th Avenue Property. *Infra.* The Appellate Court can take judicial notice of existing lawsuits and note that NWC seemingly is agreeing with the trial court that a remedy as to 38th Avenue did not lie in the case now on appeal.

The court should also be aware that the amount in dispute was $139,075.74 (CP 594).

The trial court's ruling on the issue of corporate disregard was supported by substantial evidence and under existing, well-reasoned law. The trial court's ruling on attorney fees and costs as to the Rehes was reasonable based on the intertwined nature of the claims, defenses and the efforts of the defendants to limit costs by having a joint defense. This court should be aware that NWC sued six entities and either dismissed voluntarily or lost against four defendants. The trial court correctly found, citing to well-established law, that the plaintiff was not entitled to a solvent defendant. Throughout this case, the respondents have repeatedly referred to the majority of this case as a fishing expedition. The trial court rightly saw much of the case similarly and this court should as well.

II. RESPONSE TO ASSIGNMENT OF ERRORS

The trial court's Findings of Fact 26 and 34 through 39 are supported by substantial evidence. The trial court's Conclusions of Law 5 through 12 were based on substantial evidence and are correct as a matter of law.

The trial court appropriately exercised its discretion in awarding attorney fees in favor of the Rehes against NWC and its award was well based on the record and in existing law.

The judgment against NWC rendered was correct, reasonable and well within the discretion given a trial court.

Issues Pertaining to Appellant's Assignment of Error:

A. Does the record reflects that evidence and testimony was admitted and considered by the trial court related to NWC's claim of corporate gutting involving the 38th Avenue Property?

B. Was the trial court acting within the evidence and within its discretion in considering evidence NWC now claims should have been given more weight or, seemingly is claiming, that it should have been dispositive of intentional use of corporate form to evade a duty to a creditor?

C. Was the trial court supported by substantial evidence in finding that NWC did not suffer an unjustifiable loss given it took no pre-contract action to protect itself or negotiate additional security?

D. Did the trial court act within its discretion in considering the fee request of the Rehes?

E. Should the trial court have considered the totality of the circumstances of the joint defense, the economies of having one attorney, the disparity in the requests of NWC and the Rehes in reaching its fee award?

F. Did the trial court act within its discretion in awarding the Rehe fees of $85,000.00 given that NWC prevailed against only two of six defendants and on two of six causes of action and when it awarded $270,654.90 in fees for NWC?

III. STATEMENT OF THE CASE

Unique contracted with NWC on 3/27/06 for the infrastructure of a 34-lot plat in East Tacoma. Ex. 4; CP 11; RP 3/20/12 p. 18-19. The contract allowed for NWC to run a credit check on Unique. Ex. 4. NWC never ran such a check. RP 3/26/12 p. 32. NWC never sought a personal guaranty. RP 3/26/12 p. 33. NWC never sought to look at Unique's financial statements. RP 3/26/12.p. 32. Despite the Contract being for $583,812.50, NWC ended up billing $951,203.18. Exhibit 4, Exhibit 14 third page. RP 3/20/12 p. 32. Much of the jury trial related to various "extra work" which involved, in large part, the water system and the street lighting. Ex. 19 (Extra Work ("EW") 11 and 20); Ex. 35. While the jury verdict is not under appeal, it is noteworthy that there was no written authorization for the streetlight RP 3/20/12 p. 68. The water system billed was 50 percent (50%) more than quoted. RP 3/20/12 p. 32. Much of the extra work was billed very near end of the project despite having been performed, per NWC records, upwards of a year earlier. Ex. 10, 11, 19. The extra work was billed after a dispute about the cost of light fixtures wherein NWC charged $88,297.00 and Unique had the job done by someone else for about $27,000. Ex. 19 (EW 20) RP 3/20/12 p. 78, 159-62. Thereafter, as the real estate market imploded, the lots lost value to the point it became a complete loss and was foreclosed and lost at great loss to Unique and its sole shareholders, the Rehes.

A. Unique was a small S-Corp.

Despite NWC's ongoing assault as to what it claims to be nefarious activity, the evidence showed that Unique Construction was originally a sole proprietorship formed about 40 years ago. RP 3/26/12 p. 22. It was incorporated in 1984. RP 3/26/12 p. 22. William ("Bill") and Suzanne Rehe have been the sole shareholders. RP 3/14/12 p. 32. Bill always did the books. RP 3/26/12 p. 22. He also did the tax returns for Unique and described it as a "flow through" S-Corporation RP 3/26/12 p. 35. His method of accounting on each project was to keep "a box" where he would keep all of the expenses and paperwork related to each project. RP 3/26/12 p. 22-23. At intervals, he would go through the box and update his computer records. RP 3/26/12. p. 24; RP 3/22/12 p. 30-31; Finding 9 CP 1021. This informal accounting system predated any involvement with NWC. RP 3/26/12 p. 22; Finding 10 CP 1021.

Bill Rehe believed, that given that Unique was an S-Corporation and was a flow through entity, that distinctions related to personal and business expenses were not overly important as it would all flow out to his personal tax return anyways. RP 3/26/12 p. 35, 40-41. For instance, Bill Rehe would charge large construction related expenses on his personal credit card, not for some inappropriate reason as insinuated by NWC, but rather to get credit for airline miles from the credit card company. RP 3/26/12 p. 27. Bill Rehe would then go through the credit card statement and allocate which portion of the bill would go to which project. RP 3/26/12 p. 26-28. The unallocated portions of personal expenses were not

attributed to the business ventures and put in the "personal box." RP 3/26/12 p. 26-27. Again, this practice predated any activity with NWC. RP 3/26/12 p. 22, 37.

While NWC wishes to point to checks made for "cash" from Unique to the Rehes, NWC own expert, Paul Peterson, acknowledged that such 16 "cash" checks that occurred long before Unique became insolvent. RP 3/22/12 p. 12. The "cash" checks totaled $33,298.80 from July 2005 to the expert's trial testimony on March 15, 2012. RP 3/15/12 p. 261. Unique never paid the Rehes any salary. RP 3/15/12 p. 259. NWC's expert testified that Unique could have properly disbursed funds to the Rehes in the form of wages or distributions to owners. RP 3/22/12 p. 10-11. Mr. Peterson acknowledged "Unique was out of cash in 2006 and most this stuff [cash distributions] occurred way before that timeframe." RP 3/15/12 p. 261. Mr. Rehe testified that much of the cash was used for business related expenses. RP 3/26/12 p. 28-29.

This same sort of informality arose related to the 89th Street Property. While NWC complains that the Rehes used the house without rent, NWC's own expert could not explain how this house magically appeared as an asset of Unique in the first place except to agree with Bill Rehe, that it came from the Rehes' personal funds. RP 3/15/12 p. 216, 255, 256. Mr. Peterson said the Rehes lived there 48 months and placed the rent at $2,000.00 per month for a Gig Harbor home when Mr. Peterson qualifications for the opinion was merely owning six rentals in Seattle. RP 3/15/12 p. 244-246. Bill Rehe refuted Mr. Peterson's claim that the

Rehes lived in the 89th Street Property such 48 months. RP 3/26/12 p.36. A dispute arose whether the Rehes' funds towards the 89th Street Property should be characterized as a loan or a contribution with NWC's expert saying it should be treated as a contribution (RP 3/15/12, 216-217, 255-256) and Bill Rehe saying it was a loan. RP 3/26/12 p.31. Still, despite the Rehes conferring such funds on Unique, Unique never paid any interest back to the Rehes – even NWC's expert so agreed. RP 3/15/12 p. 256 The 89th Street Property got tied up in unrelated litigation in which Unique prevailed. RP 3/15/12 p. 171-72. Still, by then, the Rehes needed a place to live and having funded the 89th Street Project and taken nothing back, moved into the home. RP 3/26/12 p. 36.

NWC, dwelling on innuendo, claims that the Rehes failed to report the benefits to the IRS. Appellate Brief p. 5. Not that this is really that relevant to the appeal, but this is incorrect. Bill Rehe testified that he was audited by the IRS and, essentially, was doing things fine. RP 3/26/12 p. 39-40.

At trial, NWC's expert was only able to identify $175,000-180,000 in claimed personal expenses. RP 3/15/12 p. 247. Of such amount, a portion was for medical insurance and expenses which Mr. Peterson acknowledged could have been run through the company properly. RP 3/15/12 p. 262. $96,000 was a rental benefit estimated by the non-appraiser, inactive CPA, Mr. Peterson. CP 3/15/12 p. 244-46. $33,298.80 were checks to "cash" that Mr. Rehe testified were used for business. *Supra.* Mr. Peterson testified the date of Unique's insolvency was July 29,

2009, when the 89th Street Property was transferred. RP 3/22/12 p. 3. The commingling, NWC's expert testified to, was from 2005 to 2008. RP 3/22/12 p. 15. When asked if he was testifying if the commingling caused Unique to be unable to pay NWC, Mr. Peterson answered:

> I don't know why they didn't pay them. I know that when they transferred the house they could not pay them. These types of transactions make it more difficult for them to pay, but I believe, absent the transfer of the house, there was enough assets left to pay Northwest had they elected to do so.

RP 3/22/12 p. 15.

The trial court wisely picked up on this in finding "[w]hile Mr. Rehe's accounting practice are substandard, they were not designed to intentionally evade a duty to a creditor." Finding 35, CP 1046.

NWC's expert testified the larger questionable expenses on the credit card were under $20,000 over five years. RP 3/15/12. p. 257. During such time hundreds of thousands of dollars ran through the credit card. RP 3/15/12. p. 258. Mr. Peterson, when asked if it was material in "the big scheme" of things, said "not when you add it up according to the total volume of transactional activity...." RP 3/15/12. at 259. The trial court found the questionable expenses to be "diminimus in the overall view of Unique's activities, predated the NW Cascade, Inc.'s contract, and did not cause the inability of Unique to pay its creditors." Finding 34, CP 1046.

B. NWC'S claim of "asset striping" relates to two properties the Rehes paid for and which NWC never contemplated in contracting.

There were two primary assets that NWC claims to have been "stripped" from Unique: The 89th Street Property and the 38th Avenue property. Appellant Brief p. 7. As a bit of a prefatory statement, it is important to note that the 89th Street Property was transferred to Sahara Enterprises, LLC – a party to the litigation. The 38th Avenue Property was ultimately transferred to Winnemucca Enterprises, LLC – not a party to this litigation. The argument seems to be, as the undersigned reads the Appellate Brief, that the trial court did not "consider" the 38th Avenue Property as "evidence of asset stripping that further justified corporate disregard." Appellate Brief at p. 8. Still the court needs to understand that substantial evidence was submitted before the judge and the jury as to the 38th Avenue Property. It was the necessity for an explicit finding that the trial court rejected as related to 38th. NWC is confusing consideration of evidence with the need for a findings on a property transfer not asked to be avoided under UFTA. Also, NWC is confusing the UFTA notion of "consideration" (i.e., money) for a judge's "consideration" (i.e., deliberation).

At trial the quitclaim deed out of Unique related to 38th Avenue was admitted. (Ex. 87). The corresponding real estate excise tax affidavit was admitted. (Ex. 121). NWC's expert testified to the transfer of the 38th Avenue Property numerous times on direct. RP 3/15/12 p. 190-197, 208-209. On cross NWC expert acknowledged such deeding to be in the

public record and not hidden. RP 3/15/12 p. 209-211. When asked where the money for 38th Avenue came from, Mr. Peterson referenced (and did not dispute) Bill Rehe's testimony that it came from the Rehes' personal funds. RP 3/15/12 p. 216. Mr. Rehe testified to the circumstances leading up the deeding of the 89th Street Property and the 38th Avenue Property at length during examination by both NWC and Mr. Rehe's counsel. RP 3/14/12 p. 56-62; RP 3/15/12 p. 106-107, 124, 165-66, 183-84; RP 3/20/12 p. 97-105, 117, 167-68; and RP 3/26/12 p. 43. Mr. Peterson testified that ultimately it was the 89th Street transfer that caused Unique's insolvency and inability to pay. RP 3/22/12 p.3, 15-16. The point being, there was substantial evidence and testimony admitted before the court as to the 38th Avenue Property. The argument of NWC as to the judge's comments are out of context. The actual comments, and the comments of NWC's counsel demonstrate that the 38th Avenue Property was considered:

The Court:

> The jury verdict form deals with the 89th Street property, not the 38th Street property, and I was not asked to make a decision with respect to the 38th Street property, correct? I was asked to make a decision on piercing the corporate veil.
>
> MR. MURPHY: But the 38th Street transfer was part of our theory relating to piercing the corporate veil.
>
> THE COURT: Okay. At the beginning of the trial, Plaintiff moved to bifurcate the trial and said that the question of piercing the corporate veil, that

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limited question, was a question of law that had to be presented to the Court and not tried to the jury and that all the factual issues, essentially, except as it related to, specifically, the piercing the corporate veil were going to be presented to the jury. So, for example, the jury made a decision with respect to the 89th Street property. The 38th Street property, and I think we've had this discussion more than once, was never presented by the plaintiffs to the jury to decide, nor was it decided -- asked for me to decide. I don't recall making that decision.

MR. MURPHY: I believe that language actually comes from your oral decision, but let me -- before I try and dredge that up here -- that is not correct, Your Honor.

THE COURT: What is not correct?

MR. MURPHY: What you just said. The evidence on the 38th Street property was presented to the jury as part of the evidence.

THE COURT: That isn't what I said. What I just said was the question of whether or not the 38th Street property had consideration was never given to the jury, and if you look at the jury verdict form --

MR. MURPHY: No, I --

THE COURT: -- it does not include anything

about the 38th. I didn't say that the evidence wasn't presented. I said the question was never asked for them to decide.

MR. MURPHY: No, I understand that. And I agree with that part of it. The evidence was presented. That evidence was relevant in both parts of the case. Part of it had to do with proof of the intent-to-defraud standard under the second prong of Fraudulent Transfer Act. It was also relevant to the piercing corporate veil claim because that's one item in factors to be considered in terms of piercing the corporate veil.

It was relevant in both cases, and -- but it was more significant -- it was actually relevant to consideration of the issues in the piercing the corporate veil side of the case as far as its legal significance in terms of a decision, but it was presented as relevant in both sides of the case.

I believe that that language came from your oral decision.

(Pause.)

THE COURT: Go to Page 14 of my oral ruling where I say at Line 15, "Well the jury wasn't asked that question."

And then you speak, and then at the bottom of the

page, I say "I didn't analyze the 38th. I was just basing it on the jury verdict. I wasn't looking at any other assets."

MR. MURPHY: Right. I agree with you that you were not analyzing it from the standpoint of fraudulent conveyance. We discussed that last time. But the factual question of whether or not there was consideration for that transfer, I recall, was addressed, and my recollection was in your ruling, you said that.

***

THE COURT: Same thing at the bottom of Page 4 and on to the top of Page 25. I again say, "The 89th Street property, we have a jury verdict determining that was a conveyance. We do not have a determination that the transfer of the 38th Street property was --"

MR. MURPHY: Right. That's the -- but the issue is whether or not there was -- the issue is not whether or not there was a fraudulent conveyance. I agree with that. I don't think anybody is arguing that point. The issue is whether or not there is a consideration, and I mean we discussed that at some length the last go-round.

THE COURT: You never presented the question. And again on Page 27 in the middle of the page I was speaking and said, "The jury was not asked to find that the transfer of the 38th Street property was a fraudulent conveyance."

No one ever previously indicated to this Court that this Court was going to be asked to determine that the 38th Street conveyance was a fraudulent conveyance. I was asked to consider the issue of piercing the corporate veil.

MR. MURPHY: That is correct, but you were asked to consider the impact on the piercing claim of the transfer of the 38th Street property for no consideration.

THE COURT: I'm not going to restate my question. All that we're talking about here is Mr. Burns' challenge to one sentence in the Findings. I believe he is correct and I'm instructing you to delete it.

Your objection is noted for the record.

I don't believe that the record supports keeping that sentence in. I wasn't asked to make that determination.

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RP 7/27/12 p. 7-11.

The line struck out on the Findings read "There was no consideration for any of the transfers of the 38th Street Property." CP 1044.

The record is clear that the jury and the court considered 38th Avenue as it admitted evidence and heard testimony. However, the court rightly noted (and NWC's Counsel agreed) that the court was not asked to render a determination as to 38th Avenue. The entire colloquy, which NWC is arguing, relates to a finding as to whether the 38th Avenue transfer had legal consideration. The trial court repeatedly pointed out that neither the court nor the jury was asked to make that determination regarding 38th. No one then alleged the 38th Avenue Property was, itself, the subject of the UFTA claim. The evidence was still admitted in both the jury and bench portions of the trial, and the court made a ruling based on all evidence as to the veil piercing claim. Nowhere in the record does the court say the evidence was not considered – just that no finding specific to 38th was needed. This entire argument is so out of context, as the trial court noted: "All we are talking about here is Mr. Burns challenge to one sentence in the Findings. I believe he is correct and I'm instructing you to delete it." RP 7/27/12 p. 11. Nowhere was the evidence or testimony stricken.

C. Facts presented and discussion related to attorney fees.

An extensive Declaration of Martin Burns was submitted in support of the Rehes' request for attorney fees. CP 463-577. The declaration goes through and attempts to separate and color code the time between the successful claims and the unsuccessful claims from NWC's

perspective. The billings were attached and had substantial detail as to the work involved by the undersigned's office. CP 470-515. Still, as pointed out by the undersigned, and acknowledged by the trial judge, there was overlap between the successful and unsuccessful claims (from NWC perspective):

> I have gone through the billings and I have highlighted matters that seem to have clearly gone towards successful claims, from Northwest Cascade's perspective in *green* and unsuccessful claims in *yellow*. However, I will tell the court that this was exceedingly hard to do as so much of the case was intertwined. For instance we spent an awful lot of time on jury instructions. While the jury came back in favor of Northwest Cascade, half of the jury verdicts are rendered moot by the court's determination with regards to the piercing of the corporate veil. As I went through the pleadings and the very detailed billings that our office provides, it was very hard to separate out really very much of the case. I did separate out the portions related to the third deposition of Bill Rehe and Suzanne Rehe were that were taken which was pretty much going through check after check after check related to Temporal Funding and Unique Construction. These all seem to relate to the piercing of the corporate veil claims and so I counted those as unsuccessful claims. I also highlighted some of the matters related to the counterclaims and motions, in Northwest Cascade's favor, that were caused by our assertion of a counterclaim for restitution that proved to be unsuccessful. On the flip side of the coin, I went through and counted much of the time related to answering the amended complaints in favor of the Rehes as much of those cases related to piercing of the corporate veil as well. Much of the action related to trying to get to the stock accounts owned by the Rehes and, therefore, to a great degree those claims were unsuccessful and, therefore, I highlighted many of these issues in yellow. However, the court can see that it is very hard to differentiate such time

> and the court is more than welcome to review the entries and try to reallocate the time, but it is not particularly easy.
>
> The amount of the billings that I was able to differentiate are as follows:
>
> > Unsuccessful claims noted in *yellow* 7,560.76
> > Successful claims in *green* 2,592.75
>
> The amount of time that I would think that would relate to both of the cases is the difference between the $83,363.76 - $10,153.51 = $73,210.25.

CP 466-67.

As NWC's counsel notes, the undersigned represented all defendants. Appellate Brief P. 8. Had this not occurred, there would have been multiple bills from multiple prevailing defendants and the claim against NWC would have been higher. Nowhere, as best the undersigned can tell, does NWC claim that the total amount of time and/or the total amount of fees spent on defending the unsuccessful claims of NWC are unreasonable. This is understandable when one considers that the total fees incurred by the Defendants were $135,417.20. CP 467. The total request of NWC was fees of $237,924.54 against Unique, $98,191.08 against Unique and Rehe, $25,000.00 in a sanction, $74,640.79 in interest, and $13,994.37 for costs for $449,750.75 (plus an additional unspecified sanction). CP 605. NWC later supplemented with more fees and expert fees of $21,487.09 of which NWC asked to allocate $11,173.29 towards successful claims. CP 910-911. The total fees billed by McFerran & Burns, P.S. from the inception of its involvement to the fee request (including time estimated for the fee matter) was $93,263.76 (CP 464,

467). The billings by Groff Murphy, PLLC for the month of November 2011 alone (when the trial was "bumped") were $84,665.64 and in the month of trial, March, 2012 alone were $89,597.39. CP 713, 728, respectively. On the other hand, the November 2011 and March 2012 billings for the Defendants were $26,416.94 and $32,726.60, respectively. CP 496 and 476.

Of the claims existing on the morning of trial, the results broke down as follows:

(a) Northwest Cascade, Inc., v. Unique Construction, Inc., Plaintiff prevailed;
(b) Northwest Cascade, Inc., v. Temporal Funding, Plaintiff nonsuited;
(c) NW Cascade v. William Rehe, Defendant prevailed;
(d) NW Cascade v. Suzanne Rehe, Defendant prevailed;
(e) Temporal Funding v. William K and Marion L LLLP, Defendant prevailed; and
(f) Northwest Cascade v. Sahara, Plaintiff prevailed.

Two-thirds of the defendants prevailed. Put otherwise, NWC prevailed against only one-third (1/3) of the defendants it named.

As argued by defendants, the Plaintiff was in search of a solvent defendant. The timeline of the case history shows NWC repeatedly amending its complaint to pursue whatever or whomever, it perceived as having deep pockets. The time line is:

> Second, if the court were to take the timelines of this case as to what calendar time was spent on successful claims, it would break down: First cause of action (7/7/08) against Unique, about 13 months prior to First Amendment (10/30/09) First Amendment at Temporal Funding, about 18 months; (4/27/11) Third Amendment to add William K

> and Marion L LLLP, about 4 months; (8/16/11), Third Amended Complaint to add Sahara, 3 months. The first trial was set for November 23, 2011. Therefore, about 55 percent of the pure calendar time breaks down on complaints that were unsuccessful. However, the court can look at the pleadings leading up to the motions to amend to see that substantial work was done by the Plaintiffs in preparing the motions to amend which eventually resulted in unsuccessful causes of action.

CP 459.

The court noted the disparity in the fee requests and the fact the undersigned was defending multiple defendants. The trial court originally was, mistakenly, going to award almost of all fees billed to the Rehes assuming the $128,963.41 was after segregating unsuccessful defenses given the amount of the NWC fee request. CP 999, RP 7/27/12 44-45. Obviously, NWC pointed this out and the trial court said:

> THE COURT: No. I understand that. I understand for both of you that I'm putting you both on the spot, but that's why we're here. Clearly, I misunderstood your original request for attorney's fees. I thought you had already redacted out expenses, and I assume you can all appreciate how I would arrive at that since yours -- if your total is $128,000 and his total was in excess of $400,000, right there there's a significant disparity in the attorney's fees and you're defending on several different fronts and he's representing one client.

RP 7/27/12 44:16 – 45:1. The court went on to explain:

THE COURT: The quote that I put in the letter decision, "The determination of the fee award should not become an unduly burdensome proceeding for the Court or by the parties," I thought was particularly appropriate in this case. Both counsel have indicated to this Court that it's difficult for them to segregate out what fees were incurred as it relates to which defendant and which claims, and I have no reason but to accept the statement of both counsel, and if they can't segregate the fees, I can't imagine how any other Court would expect this trial court to segregate the fees.

I would agree with Mr. Burns that he would had to have been at virtually everything and throughout the trial. I remember most of our time spent on jury instructions, however, dealt with the UFTA claim and we went round and round and round and round on that because, again, as I acknowledged in the letter, there's no patterned instructions dealing with that and there was no patterned verdict form, and the three of us worked very strong together on that to come up with what we thought was the appropriate instructions and

> the appropriate verdict form, not the issue of veil piercing that the Rehes prevailed on. So that time he might have still been present but, really, that wasn't -- all that time that we spent on those jury instructions and the verdict form, I think related, really, to the UFTA. I think everybody pretty much agreed on everything other than that. Given that the reality, however, that Mr. Burns was in fact representing all of the defendants, but keeping in mind that he would have been here had he only been representing the Rehes, I don't think $128,000 is the right number. I do think it should be significantly less. On the other hand, I don't think $14,000 is the right number either. That certainly isn't the number that Mr. Murphy incurred in pursuing that claim, even under his theory of 11 percent. Given that Mr. Burns would have been here throughout, in any event, I believe that an appropriate figure is -- one second, I just had it in my head. $85,000 is what I'm awarding to the Rehes against the plaintiff on piercing the corporate veil.

RP 7/27/12 52:4 – 53:21.

IV. STANDARD ON REVIEW

NWC correctly recites this court should review the trial court's ruling on piercing the corporate veil for substantial evidence. Also, attorney fee awards are within the discretion of the trial court and will

only be reversed if there is manifest error. (citations omitted) *Boeing v. Sierracin Corp.*, 108 Wash. 2d 38, 65, 738 P.2d 665 (1987).

V. ARGUMENT

A. The trial court properly held that the corporate veil should not be pierced.

There are numerous independent reasons why the trial court should be affirmed: (1) The remedy of piercing the corporate veil is an extraordinary remedy which was properly within the discretion of the trial court to deny; (2) the trial court's finding that the disregard of corporate formalities did not cause NWC's loss is supported by substantial evidence; (3) NWC failed to take steps to protect itself by requesting personal guarantees, additional collateral or security; (4) The finding that Bill Rehe's accounting practices were not designed to intentionally evade a duty to a creditor is supported by substantial evidence; and (5) NWC attempts to pierce the corporate veil is simply an impermissible attempt to create a fund against which to collect a judgment.

This court should recognize that any of these five reasons are independently sufficient to affirm the trial court. What NWC is doing is asking this court to substitute its judgment for that of the trial judge as to factual issues. This is inappropriate. As will be discussed herein, even if this court were to disagree or perhaps think it might reach a different conclusion than the trial court – that is not the test. The test is whether or not the decision of the trial court is supported by substantial evidence. For instance, NWC is making a big deal out of finding 22 wherein the line

"There was no consideration for any of the transfers of the 38th Street [Avenue] Property" was stricken.[2] The evidence regarding 38th Avenue was admitted, was considered and was weighed by the trial court and would generally be perceived as negative to the Rehes' defense. On the other hand, there was proof that Bill Rehe had long standing accounting practices that predated the NWC contract, which made sense as to how, being an S-Corp, the corporate profit or loss would flow out to the individual return, and that the Rehes could have ended up at the essentially the same spot had they accounted correctly.[3] The point being, there was evidence on both sides. NWC wants to argue, essentially, that one piece of evidence trumps all other evidence. This is a court of law, not a pinochle game. It is not this court's province to invade the function of the trier of fact.

1. Basic law as to the piercing of the corporate veil.

The notion of piercing the corporate veil is an equitable remedy. (Citations omitted) *Truckweld Equipment Co., Inc. v. Olsen*, 26 Wn. App. 638, 643-44, 618 P.2d 1017 (1980). However, piercing of the corporate veil occurs only in "exceptional circumstances." *Id.* at 644. In such exceptional circumstances "the corporate entity will be disregarded where

[2] Appellant is correct that it should be "Avenue" and not "Street". It also was referred to, at times, as the "Gig Harbor lot". Still, interestingly enough, despite complaining bitterly about the colloquy leading up to the striking of such single line, NWC does not assign error to such finding.

[3] For instance, in the cross-examination, NWC's expert acknowledged that the Rehes could have taken money out as wages (RP 3/15/12 p. 259) or owner distributions (*Id.* at 260) and they could have more appropriately run the medical insurance through the company. (*Id.* at 242-43).

its recognition would aid in perpetrating a fraud or result in a manifest injustice." (Citations omitted) *Id.* In the *Truckweld Equipment* case, there was a Plaintiff who pointed to the absence of corporate documents, corporate minutes, resolutions and tax returns. The piercing of the corporate veil was rejected in the *Truckweld* case because it "lacks the characteristic injustice found in a piercing of the corporate veil situation. The informality with which Aztec may have been operated neither prejudiced nor misled *Truckweld* in its consideration of Aztecs credit application." *Id.* The court also stated "in any event, we cannot see how *Truckweld's* position would have been different had Aztec meticulously documented its corporate action." (Citations to numerous cases omitted) *Id.* "Moreover, we see no injustice to *Truckweld* from the mere fact that Aztec was unable to eventually pay before the assembly and modifications. The limited liability afforded a stockholder of an otherwise legitimate corporate enterprise does not, without more, justify invocation of the disregard theory. Personal liability on that basis alone would undermine the very foundation of the entity concept." (Citation omitted) *Id.* The *Truckweld* decision goes on to state that typically such cases allowing the piercing involve "fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and the creditor's detriment." *Id.* citing to *Morgan v. Burks*, 93 Wn.2d 580, 611 P.2d 751 (1980). In the present case, common law notions of fraud are not even alleged by the Plaintiff against Unique. There is obviously the UFTA claim – but that relates to actions that long postdate the entry into

the contract and the alleged breaches. Further, the *Truckweld* court rejected the notion that inadequate capitalization equated to abuse of the corporate entity. *Id.* at 645. The court found that the owner of Aztec, Olsen, purchased the company when it was financially troubled, and sought only to improve its picture. However, the court found that there was a combination of unfortunate timing and persistent working capital problems that killed the corporation. *Id.* "We know of no rule of law requiring a corporate shareholder to commit additional private funds to an already faltering corporation." (Citations omitted) *Id.* Further, the court found that it was not a case where "Olsen induced Truckweld to deal with Aztec by representing he would infuse the company with future capital." (Citations omitted) *Id.* Division II also went on to point out how Truckweld "could have protected its interest in light of what it knew about Aztec and Olsen. Yet, Truckweld made no effort to obtain Olsen's personal guaranty prior to extending credit nor did it file timely chattel liens when Aztec's payment became questionable. It was Truckweld's failure to utilize these safeguards which contributed to its losses, not any misconduct or abuse of corporate form by Olsen." (Citations omitted) *Id.* at 646.

> The doctrine of the disregard of the corporate entity will not apply, even though the intent necessary to disregard the corporate entity may exist, unless it is necessary and required to prevent unjustified loss of the injured party.

Morgan v. Burks, 93 Wn.2d 580, 611 P.2d 751 (1980). The *Morgan v. Burks* case went on to discuss:

> The tortfeasor and the tort victim take one another as they are. Plaintiff is not entitled to a solvent Defendant, and cannot be allowed to create one by asserting disregard of the corporate entity when the activities, which admittedly otherwise might justify disregard, have had no affect on the Plaintiff's ability to collect a judgment from the Defendant corporation at the time the doctrine is asserted.
>
> The *Morgan* court went on to state:
>
> Disregard assumes that unjustified loss would occur to an individual to who the duty is owed if the entity were not disregarded.
>
> *Id.* at 589-590.

It should be noted that an action involving the disregard of the corporate form is an action in equity. *Truckweld* at 643. However, it must be clear that the activity warranting disregard "must be intentionally used to violate or evade a duty." *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403-410, 645 P.2d 689 (1982). This is important as much of what the Plaintiff is complaining about are old, small checks from Unique to various different entities such as Target and medical expenses. It has nothing to do with intentionally seeking to evade creditors. The NWC expert would not even testify as to any inappropriate intent.[4] As previously cited, NWC's expert acknowledged that while the bookkeeping

[4] On cross-examination when asked if he could "put any, you know, evil intentions with regards to, say, all of these expenses. I mean, we got Build-a-Bear on there for goodness sake. You're not saying that they're doing commingling for some bad purpose, are you?" Paul Peterson testified: "I have no idea why they were doing it." When pushed again as if there was evil intent he said "I don't know what their intentions are." RP 3/22/12 p.26.

could have been better kept, the amounts could have simply been paid to the Rehes as wages or done as a 1099 distribution out of the corporation account. Further, "[h]arm alone does not create corporate misconduct." *Id.* at 410-411. "Separate entities should not be disregarded solely because one could not meet its obligations." *Id.* "The absence of an adequate remedy alone does not establish corporate misconduct." In a cases involving repayment of shareholder loans the Court of Appeals held that "the mere fact that a corporate officer may have received an improper preference does not mean that the corporate entity must be disregarded so as to render him liable directly to all corporate creditors." *Block v. Olympic Health Spa, Inc.,* 24 Wash. App. 938, 949, 604 P.2d 1317, 1324 (1979).

2. Piercing the corporate veil, or not, is in the trial court's discretion.

NWC ignores the very basic, and binding, precedent from Division II in the *Truckweld* at 643 (emphasis added):

> Truckweld's principle contention, both at trial and on appeal, is that the facts in this case require disregarding the corporate character of Aztec and placing the liability for Truckweld's services upon Olson individually. **The question whether the corporate form should be disregarded is a question of fact. In this case the trial court resolved the issue favorably to Olson. Even though the question is a close one, that ruling must stand if it is supported by substantial evidence.** *Grayson v. Nordic Constr. Co.*, 92 Wash.2d 548, 599 P.2d 1271 (1979); 1 W. Fletcher, Cyclopedia of the Law of Private Corporations s 41.3 (rev.ed. 1974).

In fact, the internally cited *Grayson* case shows the Washington Supreme Court's inclination to respect the corporate form wherein it affirmed Division I's reversal of the trial court's piercing of the corporate veil:

> It is clear from the record that Nordic was a closely held corporation. However, a corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person. *Nursing Home Bldg. Corp. v. DeHart*, 13 Wash. App. 489, 535 P.2d 137 (1975). See, *State v. Northwest Magnesite Co., supra.*
>
> There was no evidence in this case that corporate records or formalities were not kept, nor does the record indicate an overt intention by Bergstrom to disregard the corporate entity. The trial court's finding that Nordic operated as Bergstrom's alter ego was not supported by substantial evidence and was correctly reversed by the Court of Appeals.

Grayson v. Nordic Const. Co., Inc., 92 Wn. 2d 548, 553, 599 P.2d 1271 (1979). Similarly, substantial evidence supports the finding that the corporation had been in good standing with the state since 1984 (RP 3/26/12 p. 22, 29, 30), that its accounting practices predated its NWC's contract and that the lack of accounting formalities was based upon Bill Rehe's somewhat mistaken belief as to how flow through entities work as opposed to an intent to evade a duty to a creditor. *Supra.*

The point is, NWC is trying to incorrectly combine two separate legal concepts as being indistinguishable; that being the statutory uniform fraudulent transfer act claim and the equitable remedy of piercing the corporate veil. Essentially, NWC argues that all UFTA claims against corporations necessitate piercing. However, NWC cites no authority to

such illogical conclusion. NWC got its UFTA remedy in the avoidance of 89th Street transfer. NWC does not explain why it should be allowed an additional remedy (for which it did not contract or contemplate during contracting) of reaching the assets of the shareholders. Put another way, assume a company, say a large software company, kept meticulous accounting records and observed every corporate formality and still the board of directors (arguably influenced by the founder who was still a major shareholder) voted to transfer assets to its founder's foundation thus rendering the software company insolvent. Would the appropriate remedy be to avoid the transfer to the foundation or to seize the founder's billions of dollars he earned over decades? The remedy is to avoid the transfer. This illustrates the fact that what NWC is doing is disputing the appropriate, equitable, remedy. That is the province of trial court.

3. NWC has a causation problem in this appeal.

The trial court made several findings that went to the causation element of NWC's claim for corporate disregard. Finding 34 provided:

> 34. The amount of personal expenses that may have been run through the business was diminimus in the overall view of the Unique activities, predated NW Cascade's contract, and did not cause the inability of Unique to pay its creditors.

Finding of Fact 35 provides:

> 35. Mr. Rehe's accounting practices were substandard. He incorrectly viewed the S-Corporation as a "flow through" entity and that meticulous formalities were not needed. While Mr. Rehe's accounting practices

were substandard, they were not designed to intentionally evade a duty to a creditor.

Finding of Fact 37 provides:

37. It was not the manner in which Mr. Rehe kept books or the commingling of personal and corporate funds that harmed Northwest Cascade.

Finding of Fact 39 provides:

39. Prior to entering into the contract, Northwest Cascade did not ask to see the books or financial records of Unique or the Rehes. Therefore, the abuse of the corporate form by commingling and the Rehe's personal use of the corporate assets did not mislead Northwest Cascade.

CP 1025.

It is the Respondents' position that each of these findings are independently sufficient to break the requisite causal chain that NWC must prove to invoke the equitable remedy of corporate disregard. As this court is well aware, proximate causation has two components: (1) Cause in fact and (2) legal causation. *Harbeson v. Parke-Davis, Inc.,* 98 Wash.2d 460, 475, 656 P.2d 483 (1983); *Petersen v. State, supra,* 100 Wash.2d at 435, 671 P.2d 230; *King v. Seattle,* 84 Wash.2d 239, 249, 525 P.2d 228 (1974). See also comments to WPI 15.01. "Cause in **fact**" is essentially, by definition, **factual** in nature. *See,* 16 Wash. Prac., Tort Law And Practice § 4.2 (3d ed.) footnote 3 for numerous citations to this obvious point. On the other hand, "Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy

determinations as to how far the consequences of a defendant's acts *should extend. Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 176 P.3d 497 (2008); Schooley v. Pinch's Deli Market, Inc.,* 134 Wn.2d 468, 951 P.2d 749 (1998)." As cited in 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (6th ed.) **Legal** causation, is logically and by definition, a **legal** question. *Rasmussen v. Bendotti*, 107 Wash. App. 947, 958, 29 P.3d 56, 62 (2001) ("It is a legal question involving logic, common sense, justice, policy, and precedent."). Therefore, the overall issue of proximate causation is a mixed issue of law and fact. *Papac v. Mayr Bros. Logging Co.*, 1 Wash. App. 33, 37, 459 P.2d 57, 60 (1969) ("The problem of proximate causation is a mixed question of fact and law."). As in *Papac*, where Division II affirmed the finding of proximate causation based on circumstantial evidence, this court should affirm the trial court's finding of a lack of causation when there was substantial direct evidence for its decision.

4. NWC could have demanded more security.

As previously cited, Division II has refused to pierce the corporate veil when the proponent failed to take normal, commercially reasonable steps to protect itself.[5] This is part in parcel of the causation argument.

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[5] Truckweld "could have protected its interest in light of what it knew about Aztec and Olsen. Yet, Truckweld made no effort to obtain Olsen's personal guaranty prior to extending credit nor did it file timely chattel liens when Aztec's payment became questionable. It was Truckweld's failure to utilize these safeguards which contributed to its losses, not any misconduct or abuse of corporate form by Olsen." (Citations omitted) *Truckweld.* at 646.

However, it goes deeper and gets to a strain of case law that has been emphasized recently by the various Washington appellate courts in the line of cases related to the economic loss rule.[6] While this is not an economic loss rule case per se, the same judicial reluctance to fashion remedies for contracting parties for which they did not bargain should apply. NWC is asking for the court, essentially, to give NWC a personal guaranty which it did not request at the time of contracting. NWC wants to reach through a corporation to a stock account[7] once owned by the Rehes (and never owned by Unique) as a source to recover against (e.g. collateral) which it did not demand when contracting. The jury found the fraudulent transfer regarding 89th Street. The trial court reversed the transfer. NWC has the ability to reach the asset subject to the avoided transfer. Why is more needed? The entire section of the Appellant Brief[8] confuses the doctrine of corporate disregard with the notion of avoiding transfers. One is an equitable remedy. The other is a statutory cause of action (RCW 19.40 et. seq.). NWC cites to *Morgan v. Burks*, 93 Wn.2d 580, 611 P.2d 751 (1980) as support of this proposition but in that case the Supreme Court actually reversed the Court of Appeals and reinstated the trial court's

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[6] "Courts should assume that parties factor risk allocation into their agreements and that the absence of comprehensive warranties is reflected in the price paid. Permitting parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.' " *Daanen & Janssen,* 216 Wis.2d at 408, 573 N.W.2d 842 (quoting *Stoughton Trailers, Inc. v. Henkel Corp.,* 965 F.Supp. 1227, 1230 (W.D.Wis.1997))" *Alejandre v. Bull*, 159 Wash.2d 674, 687-88, 153 P.3d 864 (2007).

[7] Appellant Brief page 28, 33.

[8] Appellant Brief Section V. A. 1. A.

judgment that the piercing should not occur. In looking at the notion of "gutting", the Supreme Court said it **may** support piercing – not **require** it:

> The corporate entity is disregarded and liability assessed against shareholders in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another. *Culinary Workers v. Gateway Cafe, Inc.*, 91 Wash.2d 353, 366, 588 P.2d 1334 (1979). This **may** occur either because the liability-causing activity did not occur only for the benefit of the corporation, and the corporation and its controllers are thus "alter egos," see e. g., *J. I. Case Credit Corp. v. Stark*, 64 Wash.2d 470, 392 P.2d 215 (1964); *W. G. Platts, Inc. v. Platts*, 49 Wash.2d 203, 298 P.2d 1107 (1956); or because the liable corporation has been "gutted" and left without funds by those controlling it in order to avoid actual or potential liability, see, e. g., *Harrison v. Puga, supra*, 4 Wash. App. at 63-64, 480 P.2d 247.

(emphasis added) *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751, 755 (1980). *Morgan* at 585 then goes on, somewhat contrary to what NWC argues, to say that the court "must" and "could" consider the post-tort activity in the same paragraph (emphasis added):

> In the latter case particularly, post-tort activities **must** be considered, and often will independently support disregard of the corporate entity, because it is only after the tort that the impetus to "gut" the corporation arises. Thus, the Court of Appeals was correct in holding that post-tort activities **could** be considered in making the determination whether to disregard the corporate entity.

The above quotations bring up four salient points: **First**, no one has ever argued that Unique as a corporation was simply an "alter ego".

There is no support for such proposition as the Unique had existed for about two decade before ever entering into the contract with NWC. **Second**, the corporate form was not utilized to avoid a duty of the Rehes. NWC contracted with Unique – not Rehe. **Third**, NWC is simply wrong that the trial court did not consider the transfer of 38th Avenue. Evidence was admitted as to the transfer. (Ex. 87 and 121). Testimony including direct and cross examination of Mr. Rehe and NWC's expert was heard on the matter. Finding of Fact 22 explicitly discussed "On January 9, 2009, Unique quit claimed the 38th Street Property to Black Point which in turn transferred the 38th Street Property to Winnemucca Enterprise, LLC, another Nevada Limited Liability Company ultimately controlled by the William K. and Marion L. LLLP and the Rehes." CP 1023. Finding of Fact 25 also discussed the 38th Street Property and noted that NWC "did not name Winnemucca...as a defendant and did not include a cause of action in this lawsuit that the transfer by Unique of the 38th Street Property...was a fraudulent conveyance." CP 1023. How a party can state that the trial court failed to consider something when there are two uncontested findings of fact by the court related to such matter strains credulity. **Fourth**, despite the number of times NWC alleges the Rehe's "gutted" Unique by the transfer 38th Avenue, such assertion stands in stark contrast of its own expert who testified it was the transfer of the 89th Street Property, not the 38th Avenue Property, which rendered Unique insolvent RP 3/122/12 p. 3.

So where does that leave us? With a plaintiff who could have demanded more security or guarantees, with a corporation that has never been alleged to be an alter ego, with a trial court that considered the 38th Avenue transfer and actually discussed it in the findings of facts and with a transfer of the 38th Avenue Property that did not leave Unique insolvent. In short, NWC is wrong on each and every point in this argument and has to rely on a case, *Morgan*, which actually reverses the court of appeals and reinstated the trial court, which rejected the notion of piercing.

5. It is improper to use veil piercing to establish a fund upon which to collect a judgment.

As previously referenced, a plaintiff is not entitled to a solvent defendant. *Morgan*, at 590. NWC request to get to assets such as the stock accounts – assets never in Unique's name - simply is an attempt to create a fund upon which to collect. This is not the purpose of the doctrine of corporate disregard. Essentially, NWC is requesting the Rehes personally guaranty the Unique/NWC contract. The Court should not invoke an equitable theory in a manner not intended by law.

B. The trial court acted within its discretion in awarding attorney fees to the Rehes for prevailing in NWC's attempts to pierce the corporate veil.

1. Introduction as to fee issues and basic law.

The first observation is that NWC, absent reversal of the piercing claim, does not contest that an award of attorney fees to the Rehes was erroneous. Nor does NWC contend the amount awarded was

unreasonable. NWC simply argues that the trial court's segregation of time (and ultimately attorney fees) was unsupported. NWC labels the trial court's decision a "manifestly unreasonable" amount despite having requested roughly 340%[9] of the amount the Rehes were billed and over three times the amount in controversy. NWC's assertion - that its fees are reasonable and the Rehes' fees are not - is a lesson in chutzpah.[10] NWC argued before the trial court that it was appropriately claiming $460,924.02 but argued the Rehes should get approximately $13,000. (CP 938 and See footnote 9, *supra.)*. NWC cites to *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wash. App. 665, 689, 82 P.3d 1199, 1211 (2004), but in that case the trial court expressed displeasure with the segregation between claims that had been done by the attorneys. This never occurred in this case. In fact, the trial court expressed no dissatisfaction with the logic of the undersigned. The record is supported with the motion for fee (CP 455-62) a declaration (CP 463-577) with attached billing of 108 pages and responsive material (CP 940-949 and 1008-1012). A long hearing was had on the matter on April 27, 2012 and then again on July 27, 2012. Such hearings are part of the Report of Proceedings. The trial court went over the material carefully

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[9] Rehes requested $135,417.20; NWC requested $449,750.75 plus $11,173.29. CP 467, 605, 910-11.

[10] Chutzpah is defined as "1. unmitigated effrontery or impudence; gall. 2. Audacity; nerve." Dictionary.com based the Randon House Dictionary, copyright 2013. The classic definition of chutzpah was by humorist Leo Rosten being "that quality enshrined in a man, who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan."

and heard substantial argument. The trial court issued a lengthy opinion letter. While NWC may not like the court's determination, NWC pled cases that were intertwined between the various defendants, requested joint and several relief (CP 19), and sought to enforce the judgment from one defendant on another defendant through veil piercing. CP 16. Unlike *Loeffelholz*, which encompassed state and federal claims regarding the remarking of ballots by the Pierce County Auditor, claims of intimidation, assault, defamation, violation of open meeting acts, jury misconduct, a JNOV, the NWC case was far more simple. NWC was alleging Unique violated a contract and that, based on notions of UFTA and piercing, that other defendants (or their assets) had to answer for such breach.

When given an chance to argue as to the allocation of time before the trial judge, NWC's counsel, in acknowledging the issue of how the claims were tied together said "There was – you know, we took a deposition of Bill Rehe going through financial records...in detail. A big part of that related to the veil piercing claim, unquestionably. Martin [Burns] is totally correct about that. However, that same discovery also lead to the discovery of the fraudulent transfer claims." RP 7/27/12 p. 40. The court (right after Mr. Murphy's discussion of how his argument regarding Unique's allocation might be low (RP 7/27/12 p. 40-41)) said in discussing the procedural timelines in which the Rehes were brought into the case said "I took great pains to go through pleading by pleading by pleading." RP 7/27/12 p. 40. The trial court, in its decision cited to its own writing (CP 994-99) and said:

> The quote that I put in my letter decision, 'The determination of the fee award should not become an unduly burdensome proceeding for the Court or by the parties,' I though was particularly appropriate in this case. Both counsel have indicated to this Court that it is difficult for them to segregate out what fees were incurred and which claims, and I have no reason but to accept the statements of both counsel, and if they can't segregate the fees, I can't imagine how any other Court would expect this court to segregate the fees.

RP 7/27/12 p. 52. CP 998.[11]

There was a segregation of time made by both counsel. NWC tried to allocate 11% of the defense time (CP 938) but acknowledged that was low. (RP 7/27/12 p. 49) The Rehes pointed out how NWC prevailed on only two of the six defendants and on two of the six causes of action and argued the case was substantially intertwined and segregated $2,592.75 to portions clearly won by NWC claims, $7,560.76 to clearly lost claims and $73,210.25 to intertwined claims.[12] Similarly, the trial court realized there was portions clearly related to prevailing claims, to nonprevailing claims but that most of the claims interrelated and found middle ground in issuing the award. While the Rehes would have wanted a larger award, they understand that the law vests the trial court with this discretion, the record was replete with the various bills (some color coded), was replete with

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[11] In a colloquy about reporting rent on the tax returns in flow through entities, NWC's counsel again acknowledged the interrelation between the jury UFTA claim and the nonjury piercing claim saying "...that's one of those issues that flop over between both cases." RP 3/15/12 p. 161-62.

[12] Understand, this was segregating the time of McFerran, Burns & Stovall, P.S., and not the $35,699.65 of prior counsel Eisenhower and Carlson.

argument and law, and the trial court sat through all phases of the trial and post-trial activity. The trial court was in the best position to judge this and rendered a decision within the reasonable ranges of the evidence provided. Now, despite the trial court's efforts, NWC claims it erred. However, an examination of fee cases discloses the trial court did not err.

2. The trial court acted within its discretion.

NWC's brief glosses over the fact that this is a matter within the sound discretion of the trial court. "The amount of a fee award is discretionary, and will be overturned only for manifest abuse. *Bowers [v. Transamerica Title Ins. Co,* 100 Wash. 2d 581] 675 P.2d at 595–96. Fee requests may be adjusted upward or downward, and deference is awarded the trial court's decision. *Hensley v. Eckerhart,* 461 U.S. 424, 434, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)." as cited in *Boeing Co. v. Sierracin Corp.*, 108 Wash. 2d 38, 65, 738 P.2d 665, 682 (1987). Even in *Boeing* at 65-66, where the Supreme Court did not agree with the method of the trial court – it agreed the ultimate award "was just and equitable." Mind you, in *Boeing* the overall fee award was $353,565.45 on a $3,270,666 verdict. *Id.* at 68. In the present case, the trial court issued a letter ruling that went through an extensive review of the procedural history. CP 996-97. It then went through the legal basis for awarding fees and looked to the *Lodestar* factors.[13] CP 997-98. NWC has not argued

[13] The Washington Supreme Court in *Schmidt v. Cornerstone Investments, Inc.*, 115 Wash. 2d 148, 169, 795 P.2d 1143, 1153 (1990), refused to upset a trial court's determination on attorney fees when that trial court, similarly, had a carefully thought out

that the undersigned's rates are too high (given Burns charged $225 per hour and Murphy charged $345). CP 463 and 623. Nor does NWC challenge the total amount of time defense time spent (426 hours for the defense versus 1619 hours for the Plaintiff) . CP 465. [14] Note the trial court explicitly disclosed that the "Plaintiff and Defendants provided reasonable and detailed records which the court has independently reviewed and evaluated." CP 998. The court cited to applicable law which holds: "The determination of the fee award should not become an unduly burdensome proceeding for the court or the parties." CP 998. "An 'explicit hour-by-hour analysis of each lawyer's time sheets' is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded. *C.f., Animal Welfare Society v. U.W.,* 54 Wash.App. 180, 187, 773 P.2d 114 (1989)." *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wash. App. 841, 848, 917 P.2d 1086, 1090 (1995).

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memorandum decision: "Whether attorney fees are reasonable is a question of fact to be answered in light of the particular circumstances of each individual case, and in fixing fees the trial court is given broad discretion. *In re Renton,* 79 Wash.2d 374, 377, 485 P.2d 613 (1971) (citing *State v. Roth,* 78 Wash.2d 711, 479 P.2d 55 (1971); *Tucker v. Mehlhorn,* 140 Wash. 283, 248 P. 376 (1926)). The trial court, in its memorandum opinion, carefully considered the factors involved in awarding plaintiffs the appropriate fees and costs. There is substantial evidence indicating the court reduced plaintiffs' requested fees and costs based on a calculated assessment of time spent on claims which were never submitted to the jury. Accordingly, we find the trial court did not abuse its discretion."

[14] Respondent could not find a total hours for NWC so it added the hours in NWC bills from CP 628-728.

The notion of an appellate court going line by line through billings, (which the trial court in the letter opinion recites it essentially did), is inappropriate. The question is: Did the trial court appropriately exercise its discretion? NWC simply does not like the way the trial court made its decision but the record is replete with hundreds of pages of billings, numerous rounds of pleadings, two lengthy court hearings and a letter opinion that the trial court considered all sides and made a reasonable decision. NWC sticks to its somewhat random "11%" assertion which was simply a declaration from the attorney from NWC who looked at the clerks minutes as to witness presentation and then put his own opinion as to how that should be allocated to the attorney fee calculation. CP 871. Even Mr. Murphy acknowledged that his calculation was flawed "and probably justify an adjustment to that for some of the activities that were sort of disproportionately expensive and related, at least significantly, to veil piercing, and I think an adjustment for that would be appropriate and totally defensible on the record on appeal and I wouldn't even be arguing about that – I mean assuming that it's reasonable." RP 7/27/12 p. 49. What we end up with is the NWC allocation of 11 percent (11%) on one end (which is acknowledged to have flaws), the Rehes on the other end of the spectrum arguing for 100 percent (100%) because the issues are intertwined, and the trial court coming down in the middle. In short, the trial court exercised its discretion within the bounds of the evidence and after considerable briefing, argument and deliberation.

3. The trial court's methodology was legally correct.

NWC briefing inappropriately focuses on segregation of fees. NWC cites to *Crest Inc. v. Costco Wholesale Corp.*, 128 Wash. App. 760, 115 P.3d 349 (2005) and *Clausen v. Icicle Seafoods, Inc.*, 174 Wash. 2d 70, 272 P.3d 827 (2012) cert. denied, 133 S. Ct. 199, 184 L. Ed. 2d 39 (U.S. 2012) for such proposition.[15] However, *Costco* reversed the trial court based on the lack of "articulable grounds" not on the notion of a strict segregation as NWC argues. The case was then remanded for a "written articulable basis for its determination." *Id.* at 774. In *Clausen* the Supreme Court actually rejects the NWC seemingly "absolute rocket science accuracy" approach stating: "Icicle contends it was improper for the trial court to segregate hours spent on the maintenance and cure claim from other claims based on a generalized percentage reduction rather than on actual hourly records. Appellate courts, however, have permitted the use of a percentage reduction in segregating fees and costs when, as here, the specifics of the case make segregating actual hours difficult. Other maintenance and cure cases support the trial court's determination here." *Id.* at 82. *Clausen* has an internal cite to *Peake v. Chevron Shipping Co., Inc.*, C 00-4228 MHP, 2004 WL 1781008 (N.D. Cal. Aug. 10, 2004) which acknowledges how some issues are inextricably intertwined, or at least the issues "overlap (significantly) with nearly all other liability issues

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[15] NWC also cites to *Hardenbrooke v. United Parcel Serv. Inc.* which was related to Idaho law, was unpublished and labeled not to be used as precedent. See, 490 Fed. Appx. 42 (9th Cir July 24, 2012).

in this action."[16] Note, however, that the *Peake* court then went on to reduce the award on many of the *Lodestar* factors not at issue in this case. Still, the point is, that if the trial court gives thought to the matter and makes an award based on reasonable estimates, it is not error to fail to adopt NWC subjective, admittedly flawed and unnecessarily rigid segregation approach.

When the two basic concepts of the Appellate Brief (a court must (1) consider a possible fraudulent transfer of the 38th Avenue Property as evidence of veil piercing and (2) court must segregate all other claims from the veil piercing for attorney fees) are juxtaposed, the illogic is apparent. If a fraudulent conveyance is evidence of piercing, are not the two claims intertwined? Would not it be ill advised to fail to defend the UFTA claim if it is evidence of piercing? NWC's own arguments show the "overlap", the "intertwining" and the need for "generalizing" in making such awards. The trial court gave consideration as to all of these issues both in the letter opinion and on the record, particularly the 7/27/12 transcript. The trial court also noted the disparity in the Plaintiff and the Defendants' fee requests. The trial court was faced with competing

[16] A more complete quote for reference to the court: "Plaintiff's attorney claims that 80% of his total time is directly attributable to—or inextricably intertwined with—the 'maintenance and cure' issues that 'dominated' this litigation; only 20% of the attorney's time, he claims, is exclusively attributable to other The court sees no reason to modify or revise this ratio. It is true, of course, that plaintiff's "maintenance and cure" recovery totals only a small portion of his overall recovery; it is likewise true that plaintiff overstates the preeminence of the 'maintenance and cure' issues in his request for fees. But these 'maintenance and cure' issues did overlap (significantly) with nearly all of the other liability issues in this action, and the 80% figure proposed by plaintiff is appropriate here."

motions, billings on both sides and had overseen a jury and bench trial. It is the trial court's responsibility to juggle the many factors. It is inappropriate for NWC to isolate fragments of testimony or evidence. The Supreme Court has instructed, "the issue should be framed as to whether the trial court's award of attorneys' fees, as a whole, was reasonable." *Allard v. First Interstate Bank of Washington, N.A.*, 112 Wash. 2d 145, 148, 768 P.2d 998, 999 (1989) *amended,* 773 P.2d 420 (Wash. 1989). After thought, the trial court held "an award of attorney's fees in this case cannot be determined with mathematical precision," rejecting appellant's "trial time" analysis and respondents' pure "inextricably intertwined" argument. CP 998. Even if this court were to think the trial court's decision was a "close question" it should "defer to the trial court's discretion and sustain its calculation of attorney's fees." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 336, 858 P.2d 1054, 1074 (1993).

The trial court in its written ruling noted how the basic contract claim "was relatively straight forward." CP 999. It was the ferocious pursuit of the piercing claims that put at risk substantial stock accounts and personal assets of the Rehes, which had to be defended in a both a jury and bench trial. The fees awarded to the Rehes, as a whole, given the tenacity of NWC litigation is very reasonable and should be upheld. As discussed below, the same cannot be said for the NWC fees.

4. The Rehes should be awarded fees and costs on appeal.

NWC placed the Rehes in jeopardy for fees by attempting to reach them personally based on a contract which had an attorney fee provision. NWC acknowledges (while appealing) that the Rehes were entitled to attorney fees before the trial court.[17] Thus, under RAP 18.1, should the Rehes prevail in this appeal, further fees and costs in favor of the Rehes should be considered in subsequent proceedings.

VI. CROSS-APPEAL

The portions of the cross-appeal unrelated to NWC's attorney fee and cost award are voluntarily withdrawn.

A. Cross-appeal assignment of errors.

The trial court erred in issuing its order on attorney fees related to the attorney fees judgment in favor of NWC. CP 1028-1031.

B. Issue related to cross-appeal.

Did the trial court error abuse its discretion awarding NWC $270,654.95 in attorney fees and costs of $32,730.36 on a $139,075.75 claim (CP 1321) wherein it lost or dismissed four out of six defendants and received favorable verdicts/judgments on two out of the six causes of action.

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[17] The authority for such an award was briefed before the trial court at RP 455-461. As NWC does not challenge the premise that fees should be awarded, but wants the amount recalculated, the courts findings and conclusions as to the basic liability for fees should be accepted as verities on appeal.

C. Facts related to cross-appeal.

The pertinent facts as to the amounts of attorney's fees, the results, and the amount in dispute have been set forth above in Section III. C. and are incorporated herein.

D. Argument.

As previously acknowledged, the standard related to the review regarding attorney's fees is one of an abuse of discretion.

There is no huge issue what the law is. Washington has adopted the *Lodestar* approach. See, *Bowers v. Transamerica Title Ins. Co,* 100 Wash. 2d 581, 597-99, 675 P.2d 193 (1983). In doing so, the trial court multiplies "a reasonable hourly rate by the number of hours reasonably expended on the matter." *Id.* at 597. Then the court can adjust the award "either upward or downward to reflect factors not already taken into consideration." *Id.* at 598-99. The courts also look at the difficulty of the question involved, the skill required, the amount involved, the benefit resulting to the client, the contingent or certainty in collecting the fee and the character of the employment. (Citations omitted) *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993). In *Scott Fetzer Co. v. Weeks*, the amount in controversy was $19,000.00. The defendant prevailed on the long-arm statute and requested fees of $180,914.00. The trial court awarded $116,788.00. On the first remand, the trial court lowered the fee award to $72,746.38. On the second appeal, the Supreme Court had enough and set the fee amount without remand at $22,454.28. *Id.* at 143-44. Even though the appellant provided "extensive

documentation of their efforts in this case," such documentation "is not dispositive on the issue of the reasonableness of the hours." *Id.* at 151. The Supreme Court noted the hours added up to "three months of uninterrupted legal work by one attorney" and was "patently unreasonable." *Id.* This is similar to the present case. The November 2011 NWC billings - when the trial was bumped – had 454.42 hours billed. CP 706-713. This is almost 19 straight, 24-hour days billed in one month. NWC sought $153,848.73 in its various complaints and received verdict for $139,075.75. CP 10-11, 1036-1039. NWC litigated the case into the ground, eventually getting the $139,075.75 and getting an avoidance on an UFTA claim related to a defendant that was only added in the case on August 16, 2011 – three months before the first trial date. CP 10-11, 996. The UFTA case revolved around quitclaim deeds and real estate excise tax affidavits that were available online through Pierce County – hardly Perry Mason stuff. The point is that the NWC amount is "patently unreasonable" when taken as a whole and should be remanded for reduction.

X. CONCLUSION

The trial court entered extensive findings related to veil piercing which are amply supported in the record. NWC bases its argument that the court did not consider the 38th Avenue Property as evidence of corporate gutting despite two findings referencing the property, evidence admitted as to the transfers and substantial testimony thereto. The court's decision was well within the evidence presented. NWC simply disagrees

– but that is not reversible error. Similarly, the award to the Rehes of $88,509.00 in fees and costs when NWC was awarded $295,817.27 is facially, extremely reasonable – particularly when the amount at issue was $139,075.75. It was NWC fees which are unreasonable.

The Rehes vigorously disagrees with much of what happened at the trial. Still, the evidence was submitted and the various verdicts, decision, and judgments were made. The judgments as to veil piercing and Rehes' fees should be affirmed.

At the same time, given that NWC put such an unreasonable amount of effort in pursuing the case, the Rehes' responsive efforts are even more reasonable. This court should resist any urge to send both sets of fees back on remand. One award is reasonable given the tenacity of the other party, the amount in controversy, and the results obtained. The other award is so out of proportion that, when taken as a whole, the trial court erred in such decision and remand is required as to the fees and costs awarded to NWC.

RESPECTFULLY SUBMITTED this 4th day of March, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of March, 2013, I caused a true and correct copy of this Brief to be served on the following via U.S. Mail and email to:

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